

*United States Court of Appeals
for the Second Circuit*



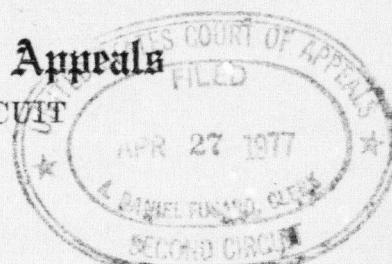
BRIEF FOR
APPELLEE

ORIGINAL

76-7421

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET No. 76-7421



ANTON PICINICH,
Plaintiff-Appellant,
against

CHRISTIAN HAALAND & BOISE-GRIFFIN STEAMSHIP
COMPANY, INC.,
Defendants-Appellees.

SKIBS A/S SAMUEL BAKKE,
Defendant and
Third-Party Plaintiff-Appellee,
against

JOHN W. McGRATH CORPORATION,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF SUBMITTED ON BEHALF OF THIRD-PARTY
DEFENDANT-APPELLEE, JOHN W. McGRATH
CORPORATION

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Issues Presented for Review

Plaintiff-appellant sets forth what he conceives to be the issues presented for review on pages 4 and 5 of his brief.

Since all plaintiff's claimed errors relate to the charge of the Trial Court one additional issue must be considered: Was there any conceivable justification for giving the charges requested on plaintiff's behalf—at least to the extent that they were not already fully and fairly charged by the Court?

Statement

The "Factual Statement" set forth by plaintiff on pages 5 through 11 is artfully drawn, indeed.* To appreciate

* Doubtless, this Court will experience its first intuition that something is amiss with the validity of plaintiff's position when it compares plaintiff's notice of appeal with his brief. In the manuals prescribing jury tactics for plaintiff's personal injury litigation, it is axiomatic that where plaintiff's legal position is tenuous or his factual support skimpy, constant reference must be had to the alleged "seriousness" of plaintiff's injuries. The hope, of course, is that the jury will overlook the substantive deficiencies of plaintiff's case, if sufficiently distracted by a catalog of the ills which allegedly affect the supplicating litigant.

Since plaintiff's appeal, purportedly, does not embrace the medical issues of this case, we cannot comment adequately upon plaintiff's innuendos to the effect that he was a severely stricken invalid as a result of the accident. Suffice it to say that the only physical injuries noted upon the accident reports were a few contusions and abrasions plus the loss of plaintiff's false teeth.

The justification proffered on plaintiff's behalf for his prolonged absence from work was an alleged psychological impairment said to have been brought about by his accident. The true extent of plaintiff's income during the period of his "disability" was, of course, screened from the jury's eyes by the collateral source rule.

But, contrary to plaintiff's repeated (improper upon this appeal) implications that a serious injury existed, was the testimony of defendant shipowner's psychiatrist, Dr. Kaplan. Perhaps more telling yet is the fact that, although plaintiff has been sent by his own attorneys to various physicians in anticipation of their giving testimony, he has not seen one doctor for purposes of treatment. As Dr. Kaplan pointed out, if plaintiff, indeed, suffered from the depressions he claimed, highly effective chemotherapy was available, among other treatments.

(footnote continued on following page)

how dexterously drawn it is, we would ask the Court to pause here before reading further and visualize exactly the manner in which plaintiff's brief is suggesting how the accident happened.

Our reading of plaintiff's brief is that the plaintiff was bumped off the container by another container then being lifted.

"There was general agreement that some contact had occurred between the inshore container and the off-shore container during the lifting process. As the plaintiff put it:

'That container I was on before was pulled up slowly and I could hear it was scraping on my container I was standing on. And when it cleared, all of a sudden the container I was standing slid on the empty space.' (93).

Mr. William Langan, a foreman for the stevedore and a witness to the accident, saw a container being lifted which hit another container, after which he saw a man go over the side (435). The Injury Report states that the inboard container 'bumped' the outboard container. (1N). Captain Ash for the plaintiff and Captain William Wheeler for the defendant agreed that contact between the two containers was to be anticipated (245, 400-403, 416, 776), although Wheeler denied that a bump by a two ton container could precipitate movement of another two ton container (736, 745). Captain Ash was of the opinion that such contact would, indeed, precipitate movement if no stacking devices had been utilized between the first and second tier (245, 404)." (Plaintiff's Brief, pp. 8-9).

(footnote continued from preceding page)

To the extent that the use of medieval hyperbole on the part of plaintiff's counsel in an appeal on the merits represents an affront to this Court, we must apologize on behalf of a brother attorney. We cannot forbear, however, from observing that this calculated tactic presages and underscores the lack of merit in plaintiff's later arguments.

Whatever the plausibility of this version of plaintiff's accident, it is:

1. not the testimony of the plaintiff and the other witnesses produced by plaintiff;
2. not the case the defendant was asked to defend.

Initially, Anton Pieinich's testimony, given upon direct examination, seemed clear enough:

"Q. The container being raised scraped the inboard side of the container on which you were standing; is that right?

A. Yes.

Q. And a blow to the container on which you were standing from the inboard side would have driven the container out towards the water, wouldn't it?

A. That container I was standing on didn't move while it was scraped by the other container.

Q. If I understood you correctly it was just when the one being raised finally cleared the container next to the one you were standing on, the one you were standing on suddenly moved inboard, is that right, or in towards the hatch?

A. Yes, it did, slid into that space." (A97)*

Thus, it was the claim of Anton Pieinich, first advanced on his examination before trial (and adhered to until a discernible mid-point during the course of the trial) that:

1. Pieinich was standing on the outboard, after, uppermost of a box-shaped stack of eight containers (four atop four) outboard of the after hatch of the CONCORDIA VIKING (A34-35, A112).
2. The inboard, after, uppermost of the stack had just been removed and was, at the time of the acci-

* Numerals in parentheses preceded by "A" refer to pages in the Joint Appendix.

dent, suspended in mid-air between the ship and the dock (A117)

3. The container on which Picinich was standing—he swore—suddenly moved 4 to 5 feet (half a container width) inboard into the empty space from which the first container had been removed. (A43, A93-94, A97, A114)

4. This sudden (inboard) motion precipitated him in the opposite direction over the side of the ship into the water.

Based upon this testimony, it was plaintiff's contention that the stack of containers was unstable (due, it is said, to the absence of so-called locking devices [see plaintiff's brief, pp. 5-7], as well as a quarrel with the lashing wires which had been used to secure the containers).

Lest it be imagined that this account of plaintiff was his alone, it is noteworthy that Picinich was corroborated bit by bit, contention by contention, foot by foot, incident by incident, by a willing co-worker.

John Morich, a longshoreman of the same Serbo-Croatian heritage as plaintiff, was called by Picinich's counsel to testify as to exactly what had happened. Morich told the jury:

- (a) After hooking up the after, upper, inshore container, Picinich stepped onto an adjacent container (A129).
- (b) The container that Picinich was standing on slid into the now empty space causing Picinich to fall into the water (A129, A148).
- (c) This account was personally observed by the witness Morich (A130, A147-149).
- (d) The inboard motion of the offshore movement was some five to six feet (A149).

The plaintiff had testified that the weather was calm, the ship stable and steady and there was no passing traffic (A119, 119A).

At the mid-point of the trial, it became obvious to plaintiff's counsel, as it was obvious to the Court, the jury and defense counsel, that plaintiff's account was incredible, simply a product of his own and his friends' imagination. The result of this—unhappily for plaintiff—was a defendant's verdict posited upon the jury's total rejection of the credibility of Picinich's version.

Plaintiff and his counsel had overlooked the critical significance of the actual physical structure of the CONCORDIA VIKING.

As is customary with ocean-going dry cargo vessels, the main deck of the CONCORDIA VIKING was cambered—that is—the deck sloped downward as one proceeded outboard from the center fore and aft line of the vessel to the outboard railing. This camber is visually obvious in Defendant's Exhibit D—a photograph of the weather deck of the vessel (743-744). As the trial progressed, it became patent to the Court and jury—even to plaintiff's counsel—that the containers on the weather deck of the ship had a pronounced tilt—*outboard*.

The ship's arrangement plans were in evidence. Captain Wheeler stated that the camber—i.e. the difference in height between the center line and the side of the vessel—was 16 inches (702-703).

Upon examination by counsel for McGrath, Wheeler stated that the two-tiered nest of containers was a suitable and stable platform for the purpose of discharging containers onto the dock. Wheeler opined:

"Q. What is that opinion?

A. That stack of containers would be stable to a safe degree. In my opinion you could list the ship 20 degrees and they wouldn't move." (A746)

Thus, the notion that a stably-based box of some two tons in weight could suddenly—and inexplicably—slide *uphill* was rejected by the jury as an affront to both the laws of physics and its common sense.

“Q. To what, if anything, do you attribute that line, that angle?

A. That angle is created by the camber of the deck. The container is resting on the deck which is cambered, sloped.

Q. Does that photograph, Defendant's Exhibit D, in any way bespeak of a list on the vessel?

A. No. By comparing the bulkhead, the structure of the ship, the house on the after end of the ship, with the vertical shown on the high rise building in the background, they are both about the same. But the container is off the vertical.

Q. Captain Wheeler, last week we had some testimony by the plaintiff and by a man called John Morich. You were here during that testimony, were you not?

A. Yes.

Q. I want you to assume that the plaintiff and John Morich testified while the plaintiff was atop the after-most outboard container two high, that that container suddenly and violently moved some four to six feet inboard so as to occupy the space which previously had been occupied by the container which was lifted and taken away. Have you got those assumptions?

A. I understand that.

Q. Assuming that the testimony was given, do you have an opinion as to the physical possibility of that event occurring as described?

A. I could—

The Court: Let's cut out the word violently. I don't think anybody said violently.

Mr. Leonard: I will eliminate that word.

A. I can conceive of no force that could be anticipated to cause that container to move inshore.” (A744-745)

It is no jurisprudential secret that the testimony of a witness which is opposed to the laws of nature, or which is clearly in conflict with principles established by the laws of science, is of no probative value: *Zollman v. Symington Wayne Corporation*, 7 Cir. 1971, 438 F.2d 28, 31-32; *Atlantic Coast Line Railroad Company v. Collins*, 4 Cir. 1956, 235 F.2d 805; *Born v. Osendorf*, 8 Cir. 1964, 329 F.2d 669. The triers of fact are not bound to accept even uncontroverted testimony if it is improbable, unreasonable or otherwise questionable: *Wilbur-Ellis Company v. The M/V Captayannis "S"*, 9 Cir. 1971, 451 F.2d 973, 974; *Indiana Metal Products v. National Labor Relations Board*, 7 Cir. 1971, 442 F.2d 46, 51-52.

Subsequent trial events would make it appear that plaintiff, rather desperately, decided to reject completely his own sworn testimony, the sworn testimony of his witness, Morich, the theory of liability tendered to the jury throughout most of the trial (to say nothing of all of the pre-trial procedure), and the allegations of fact initially made.

Trial of the action commenced on October 6, 1975, a Monday (A1). The trial proceeded throughout the balance of that week. Captain Ash, plaintiff's expert, was called on October 8, 1975 (A155). During cross-examination, Captain Ash was interrogated on the subject of camber (A268-269). It may be presumed that he, finally, became sensitive to the physical and mechanical implications of a two-ton container sliding uphill against the camber.

Ash's cross-examination was interrupted by the weekend of October 11-12 (October 13th was Columbus Day) and did not resume until Tuesday morning, the 14th (A337-338). Ash had supposedly been plaintiff's last fact witness, but Tuesday morning produced a surprise.

William Langan, a hatch boss in the employ of McGrath, appeared on behalf of plaintiff. Langan testified that he had not discussed the case with plaintiff's counsel before Saturday, October 11, 1975 (accounting for the fact he was

not listed as a witness for plaintiff in the pre-trial proceedings (A476)). Providentially for plaintiff, it appeared, Langan was in counsel's office to "give testimony for a friend" represented by plaintiff's counsel in another case (A476). Upon questioning by plaintiff's lawyer ("in a general conversation really" (A476)), it appeared that Langan was a hitherto unknown witness to the accident.

Langan was hatch boss at Number 4 hatch (A434) (not Number 5 hatch at which the accident occurred). Nonetheless, he testified that he had been able to see the accident.

"Q. Let me just square away with the question for the record. Mr. Langan, you tell us what it is you saw as best you recollect it.

A. Well, the first thing that attracted my attention was they picked a container up and it hit another container and I saw a man on the top go over the side of the ship.

* * *

Q. What did you observe, if anything, with respect to what happened to the container that this man had been standing on and from which he lost his balance.

A. When they picked it, from what I could see, they picked it up and the forward end of that container, pointing to the forward end of the ship, came around. When she came around she hit the forward end of the container on the outside which he was standing on, and hit it. When she hit it, this container went out, this part went outboard and this part came inboard. She wasn't exactly straight across the ship.

* * *

Q. Now I am asking you, if I may, where did the container on which he had been standing finally end up? What was its location after this was all over?

A. It was akimbo, not in a straight line. It was knocked out of line. It sat on top of the two containers underneath it." (A435-438)

We must comment, parenthetically, that if the credibility of the Picinich-Morich account was minuscule because of its sheer physical impossibility, the new and different version posited by Langan's story was equally incredible for different reasons.

- (a) The miraculous appearance of Langan at a point in the trial when plaintiff's fortunes had ebbed.
- (b) The innate implausibilities and inconsistencies in the Langan account.

Langan testified that, just before the accident occurred, his gang had been "in the deck of the ship discharging general cargo" (A439). Picinich put the time of the accident shortly after eight—when the first container was being lifted (A33-34), as did Morich (A124). Langan's gang did not start working cargo in the ship until 10:00 a.m. (an hour or more after the accident had already occurred (A489)). Langan also expected the jury to believe that, although he was descending the *forward* ladder of No. 4 hatch (for some reason facing *away* from the ladder and *toward* the accident (A482), a posture which must raise the hackles of anyone with shipboard experience) to check cargo in the hatch (481-482) he was able to see an accident which was the length of No. 4 hatch and most of the length of No. 5 hatch away from him. Langan's eyesight must have been blessed with special radiological propensities since:

- (a) Between No. 4 and 5 hatch was a superstructure and a winch platform (8 to 10 feet high) plus a seated winch operator (A491).
- (b) Stacked along the outboard side of No. 5 hatch were seven containers nested 16 feet high and 16 feet across—with Picinich being on the after outboard top container.
- (c) Langan was descending into a hatch with a 3-foot coaming around it (489-490).

Langan testified that the struck container came to rest diagonally perched ("akimbo" (A438)) on two other containers (436-438)). Previous to this, the two-ton container had pivoted around after being struck by the container actually being lifted (436).

As will appear hereinafter, the Langan description of the post-accident scene was directly contradicted by the ship's first officer (A498-499).

Some appreciation of the blatant incredibilities in plaintiff's "proof" is valuable in assessing the wisdom of the jury's findings. But particularly pertinent to the consideration of the legal issues herein is an understanding of the following.

Plaintiff, at the eleventh hour in his trial—and seeing, doubtless, the mood of the jury, elected to introduce a witness whose testimony was at direct variance with that of the plaintiff (and Morich) and in direct contradiction to the theory espoused by plaintiff's counsel in his opening address to the jury (A15).

As will be seen, plaintiff's appellate complaints arise from the fact that plaintiff undertook no theory with either consistency or coherence. Plaintiff's so-called "facts" proved ephemeral and his claims an elusive will-o'-the-wisp.

POINT I

The Trial Court correctly charged the jury that "reasonableness" was the proper standard of seaworthiness.

At this point in judicial history, it must occasion some surprise that plaintiff finds the word "reasonable" to be such a shibboleth. While we will discuss the matter hereinafter in some detail, it is not unfair to characterize plaintiff's most vehemently urged complaint as a rabid assault

on the Trial Court's application of the concept of "reasonableness" to the warranty of seaworthiness.

We had thought the language of the Supreme Court of the United States in *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550, 80 S.Ct. 926, 933, 4 L.Ed.2d 941, 948 would have been dispositive on the issue:

"What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 99 L.ed. 354, 75 S.Ct. 382."

Nor is the owner of a vessel in any sense the insurer of the safety of longshoremen working aboard the vessel. It is not enough for plaintiff to point to the shipboard situs of his injury and suggest that he has adequately demonstrated that the vessel has been proven unseaworthy—a jury verdict to the contrary being blandly ignored in the process.

The mesmeric manipulations of plaintiff's appellate prose to the contrary, the law is that plaintiff has an affirmative obligation to demonstrate either unseaworthiness or negligence or both by a preponderance of the credible evidence.

In *Garcia v. Murphy Pacific Marine Salvaging Company*, 5 Cir. 1973, 476 F.2d 303, 305, the Fifth Circuit observed:

"In *Lieberman v. Matson Navigation Company*, 9 Cir. 1962, 300 F.2d 661, the court succinctly stated the principles here involved saying:

While it is true that the requirement to furnish a seaman a seaworthy vessel is absolute, it is untrue

that this duty is limitless. 'The standard is not perfection, but reasonable fitness.' *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550, 80 S.Ct. 926, 933, 4 L.Ed.2d 941. The owner is not an insurer. *Neterer v. United States*, D.C. Md. 1960, 183 F.Supp. 893.

'In other words, a seaman is not absolutely entitled to a deck that is not slippery. He is absolutely entitled to a deck that is not unreasonably slippery.' *Colon v. Trinidad Corp.*, D.C. N.Y. 1960, 188 F.Supp. 97 at 100.

'The temporary presence of water upon the deck does not constitute unseaworthiness—to hold otherwise would make the shipowner an insurer' *Garrison v. United States*, N.D.Cal. 1954, 121 F.Supp. 617.

Whether unseaworthiness or negligence are a proximate cause of the accident are questions of fact. *Borgen v. Richfield Oil Corp.*, 9 Cir.1958, 257 F.2d 505. The burden of proving either is on appellant. *Selby v. United States*, 2 Cir.1959, 264 F.2d 632; *Lipscomb v. Groves*, 3 Cir.1951, 187 F.2d 40."

We did not use the phrase "mesmeric manipulation" casually; we meant to emphasize that plaintiff's brief, by repetitive innuendo and misstatement, undertakes to create a far different case than is justified by the evidence. A sampling of plaintiff's maneuvers follows:

"Mr. Picinich's uncontradicted testimony was that this offshore container moved while an adjacent inshore container was being lifted. The fact of this movement was substantiated by several eyewitnesses. Defendant shipowner spent much of its time at trial attempting to prove that the container in question could not possibly have moved. However, defendant could not produce a single witness who could state that, at the time of the accident, the container in fact did

not move." (Plaintiff's Brief, p. 2) (Emphasis supplied)

"We have here an *undisputed* maritime industrial accident, caused by a working surface which, by its movement, failed to perform its assigned task during the implementation of an *admittedly* improper method of discharge." (Plaintiff's Brief, p. 3) (Emphasis supplied)

"Contending all along that plaintiff had no burden to demonstrate the cause of the container's movement (21), but only needed to show that such movement rendered that container unfit for its assigned task as a working surface, plaintiff nonetheless introduced considerable evidence as to the reason for the movement." (Plaintiff's Brief, p. 11)

". . . Captain Wheeler that Mr. Picinich's container could not possibly have moved inshore, *notwithstanding the fact that defendant could produce no eyewitnesses to rebut the testimony as to actual movement, . . .*" (Plaintiff's Brief, p. 15) (Emphasis supplied.)

As may be seen, much of plaintiff's claims are posited upon the gratuitous assertion that plaintiff's statements that the container moved are "uncontradicted", "undisputed" and "unrebutted".

It is studiously ignored by plaintiff that his own witness, John Morich (who did, indeed, describe a "moving" container) stated that the offending container was lifted directly onto the pier without being respotted or repositioned after the accident (A152-154).

In the light of this admission, we must note the testimony of Captain Edwin Vangsnes, Chief Officer of the CONCORDIA VIKING (A498-499):

"Q. And when you say you looked over the place where you were told the accident happened, that is the offshore side, did you go over to the offshore side?

A. Yes, I did.

Q. And how did you get to the offshore side?

A. By the top of the hatch covers.

Q. You climbed up onto the hatch square?

A. Yes.

Q. That's up on this portion (indicating on blackboard)?

A. Yes.

Q. I take it at that time number five hatch was closed; is that right?

A. Yes, it was.

Q. Now, when you got up onto the top of this number five hatch square, up on the hatch cover of number five, how many containers were offshore on the number five hatch, do you recall?

A. Seven containers.

Q. And looking, if you will, Captain, and consider these four squares here to be four stacks, two containers high, and this to be number five hatch, I take it it was one of these top containers that was missing; is that correct?

A. The aft inshore top container.

Q. The one that bears the four and eight on the legend; is that correct?

A. That is correct.

Q. *How about the other seven containers, were they still in place?*

A. *They were all in proper position.*

Q. *Were they all one atop the other as depicted here on these—*

A. *Yes, they were as they had been during the voyage.*

Q. *Was any one of these containers turned around in any way?*

A. No.

Q. *Did you look to see whether there was any damage to any of these containers?*

A. There was no damage whatsoever." (A555-557)
(Emphasis supplied)

For Judge Griesa to have complied with plaintiff's presently-expressed views on a proper charge on unseaworthiness would have required the Trial Court not only to direct the jury's verdict (in favor of plaintiff), but to ignore the actual testimony in the case.

Judge Griesa carefully pointed out that the theories of negligence and unseaworthiness were "really quite different" (A904). As applied to the case at bar, however, Judge Griesa indicated that the "evidence" and the "problems about them" were almost identical (A904).

In some hypothetical other matter, the Judge said, the problems and evidence associated with unseaworthiness might be quite different from those involved with negligence (A905).

In so charging the jury, Judge Griesa was not operating in some legal vacuum, indulging in sophistical hair-splitting, or conjecturing concerning the number of angels which might dance on the head of a pin. He was attempting to instruct a jury concerning the real issues in a real case submitted to them.

Judge Griesa clearly instructed the jury that the duty of unseaworthiness was (1) continuing, (2) non-delegable, (3) extended to all areas of the ship and its appurtenances, (4) not relieved by relinquishment of control to a stevedoring company, (5) absolute, (6) not dependent upon the shipowner's fault, and (7) in no way dependent upon either notice to or the knowledge of shipowner (A905-906).

Judge Griesa further instructed the jury that, with respect to unseaworthiness, it was irrelevant how any condition of unseaworthiness came into being (A907). Thus, Judge Griesa had clearly and explicitly stated the very harsh requirements imposed by the doctrine of unsea-

worthiness upon a shipowner. Notwithstanding all this, however, plaintiff's brief excoriates Judge Griesa for having advised the jury that the standard by which the unseaworthiness of a vessel was to be judged was "reasonableness". (Cf. Plaintiff's Brief, pp. 20-28 and particularly pp. 24-25.) Plaintiff undertakes a count of the Trial Court's use of the words "reasonable" or "reasonably" or their converse and arrives at the number 33 (Plaintiff's Brief, p. 25).

Plaintiff's fulminations are quite understandable since the case was bereft of credible evidence which would indicate that the CONCORDIA VIKING was other than reasonably fit for its intended use. Indeed, plaintiff's counsel tries to sidestep the standard of reasonableness entirely and substitute in its place some doctrine of *res ipsa loquitur*. Plaintiff clearly argues that once a shipboard maritime accident occurs, plaintiff is entitled to a recovery. (Cf. Plaintiff's Brief, p. 19.)

The notion that the standard of reasonableness may be disregarded and a standard based on *post hoc ergo propter hoc* may be substituted was commented on by the First Circuit in *Mitchell v. Ford Motor Co.*, 1 Cir. 1976, 533 F.2d 19, 20:

"Even the strict admiralty doctrine of unseaworthiness—liability without fault—does not require perfection. See *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550, 80 S.Ct. 926, 933, 4 L.Ed.2d 941, 948; *Doucette v. Vincent*, 1 Cir., 1952, 194 F.2d 834, 837-38. There is probably little that could not be improved or, at least, that some person having sufficient qualifications to be called an expert would not say could have been improved, selecting, after the event, which design would have been better. That, however, is not the test. As the court said in *Weakley v. Fischbach & Moore, Inc.*, 5 Cir., 1975, 515 F.2d 1260, at 1267-68,

'[Plaintiffs] rely principally on an attempted showing that there were design alternatives which,

had they been adopted, would have prevented the accident or minimized its consequences. Such a showing, by itself, is insufficient to establish liability . . . It is one thing to show that the defendant might have designed a safer product; quite another to show that the product he did design was unreasonably dangerous. The defendant is not obliged to design the safest possible product, or one as safe as others make or a safer product than the one he has designed, so long as the design he has adopted is reasonably safe. W. Prosser, *The Law of Torts* § 96, at 645 (4th ed. 1971.)***

Implicit in every argument made by plaintiff is the assumption that the legal criteria of such concepts as "unseaworthiness" and "negligence" are meaningless and unnecessary, that plaintiff's burden of proof is irrelevant, that the credibility of plaintiff's account must be assumed, that the jury must shut its eyes, stop its ears and anaesthetize its common sense, that the Court must remain mute in the face of bold-faced claims representing an affront to its intelligence—all for the purpose of securing a tort recovery for an "industrial accident".

* See also, *Thornton v. Deep Sea Boats, Inc.*, D.C. S.D.Ala. 1975, 399 F.Supp. 933, 936:

"Although the duty of an owner to furnish a seaworthy vessel is absolute, the mere fact that a seaman is injured in an accident on the vessel is not sufficient, in and of itself, to establish unseaworthiness and consequent liability.

* * *

For a vessel to be found unseaworthy when an injury has occurred, the injured seaman must prove that the owner has failed to provide a vessel, including her equipment and crew, which is reasonably fit, and safe for the purposes for which it is to be used. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963); *Bowser v. Lloyd Brasileriro S.S. Co.*, 417 F.2d 779 (5th Cir. 1969)."

See also, *Puamier v. Barge BT 1793*, D.C. E.D.Va. 1974, 395 F.Supp. 1019, 1031; *Molitor v. American President Lines, Ltd.*, 9 Cir. 1965, 343 F.2d 217.

Congress and the judiciary, it appears, have been naive in assuming that the system of workmen's compensation (33 U.S.C. 901, *et seq.*—to whose benefits plaintiff was entitled and utilized) was the most civilized and humane method of dealing with the so-called "industrial accident".

Contrary to the willful preconceptions expressed in plaintiff's brief, a tort recovery against a vessel requires a determination by the triers of fact that some legal duty owing to the plaintiff has, in fact, been violated.*

Plaintiff's claims of unseaworthiness were:

1. The block of eight containers was unstable and, hence, unseaworthy.
2. The block of eight containers was unstable inasmuch as it had been "package lashed" (i.e., tied together as one unit) rather than individually secured for the transatlantic passage preceding the discharge.

* An excellent review of the authorities is to be found in a lower court decision, *Rogers v. Gracey-Hellums Corp.*, 1970, D.C. E.D.La., 331 F.Supp. 1287, 1289.

"There are certain hazards which are ordinary, and not *unreasonable*. '[M]en who make their livelihood on the water can be expected to cope with some of the hazardous conditions that must prevail even on a seaworthy vessel.' *Jones v. Moore-McCormac Lines, Inc.*, 291 F.Supp. 888, 890 (S.D.N.Y. 1968). See also *Wright v. American Trading & Production Corp.*, 294 F.2d 342 (9th Cir. 1961); *Williams v. Arrow S.S. Corp.*, 218 F.Supp. 595 (E.D.La. 1963); *Crepel v. J.W. Banta Towing Inc.*, 202 F.Supp. 508 (E.D.La. 1962); *Colon v. Trinidad Corp.*, 188 F.Supp. 97 (S.D.N.Y.), amended 188 F.Supp. 803 (1960). A sliver did fly. But from all the evidence, the court finds that, when even reasonably fit metal tools strike one another or some other metal object, slivers are apt to fly. Slivers may not fly every time, but it is to be *reasonably expected* that sometimes they will. There is not a scintilla of evidence that the tools or chain were *not reasonably fit* for their intended purposes. The possibility of flying slivers, of course, creates a hazard. But the Court finds that the hazard was ordinary and *not unreasonable*, and was one which the plaintiff, as will be shown below, was able to cope with." (Emphasis supplied.)

Judge Rubin, in the *Rogers* case, would have incurred the same sort of tirade against "reasonableness" from the plaintiff in the case at bar.

3. The vessel was unseaworthy in that it lacked deck fittings to receive container interlock devices.

4. The vessel was unseaworthy because the containers themselves did not have container interlock devices between the bottom and top tiers of containers.

5. The vessel was unseaworthy because the crew had not completely removed the lashings prior to the commencement of stevedoring operations.

Plaintiff labors mightily to create a fatal flaw in the Court's charge. Page after page of rather convoluted prose is devoted in plaintiff's brief to the claim that the Court (1) improperly and impermissibly failed to distinguish between the elements of vessel negligence and vessel unseaworthiness, (2) misled the jury—to the plaintiff's prejudice—by confusing the jury as to an (allegedly) critical distinction between unseaworthiness and negligence.

What plaintiff's brief persistently—and with the very same calculation so evident during the trial—refuses to disclose is that (whatever the seaworthy or unseaworthy nature of any of these conditions alleged by plaintiff may be), each and every one of these conditions was:

(a) Well known to the ship's officers and crew before, during and after the incident involving plaintiff;

(b) The result of volitional conduct on the part of the ship's officers and crew.

Thus, those in charge of the CONCORDIA VIKING fully knew that there were neither stacking interlocks mounted on the deck nor between the tiers of containers (with whatever consequences to stability that produced). Those in charge of the vessel fully knew—and were legally accountable for—the way in which the containers were lashed

and preliminarily unashed. There was nothing latent in the conditions allegedly constituting unseaworthiness; indeed, the shipowner had volitionally *created* most or all of them. With this state of the record, the Trial Court exhibited proper legal acuity in indicating a congruence of the facts underlying the theories of negligence and unseaworthiness.

As Judge Gurfein, of this Court, observed in *Bernardini v. Rederi A/B Saturnus v. ITO*, 2d Cir. 1975, 512 F.2d 660, 664:

"Yet the very statement of the breach of duty constituting negligence indicates that it would be a breach of duty for failure to correct or to warn of a *condition*, the condition being a slippery deck. This is a classic illustration of unseaworthiness, independent of negligence. See *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960). To recapitulate, if the deck was not in an unseaworthy condition, then the Shipowner bore no duty to eliminate an unseaworthy condition or to warn the longshoreman plaintiff of the danger. This is the exceptional case where a breach of duty can be constructed only if the deck was in an unseaworthy condition.

For the most part, as Gilmore & Black have pointed out, 'unseaworthiness has virtually swallowed up negligence.' G. Gilmore & C. Black, Admiralty § 6-55 at 364 (1957). An exception may exist, as this court found in *Conceicao* and in *A/S Ocean, supra*, when an isolated act of operative negligence renders a shipowner liable to an injured plaintiff without rendering his ship unseaworthy. *In this case, we can find no single act of negligence which did not of itself create a condition longlasting enough to constitute unseaworthiness.*" (Emphasis supplied)

For the Court to have suggested to the jury—in the context of the claims made by plaintiff and in the ~~context~~ of the sworn averments made by plaintiff and his ~~wife~~ might

be whimsically described as) "fact" witnesses—that there was some mystical distinction between "negligence" and "unseaworthiness" *in this case* would have been to make the Court itself an accomplice in the pattern of misdirection, obfuscation and distortion indulged in by plaintiff throughout the trial.

That this Court will not jam blinders on itself in an attempt to fashion a spurious distinction between "negligence" and "unseaworthiness" may be seen from its decision in *Spano v. Koninklijke*, 2 Cir. 1973, 472 F.2d 33, 35:

"The court correctly charged that the shipowner would be liable for unseaworthiness if the presence of the wire created a condition which made the ship not reasonably fit for use by the plaintiff. In the light of the jury's finding, by special verdict, that there was no unseaworthiness, that is, there was nothing in the condition of the ship which could render the owner liable, it is clear that the jury never needed to reach the question of whether or not the owner failed in a duty to warn or correct."*

* We have said that plaintiff labors mightily, but futilely, to conjure up a (non-existent) distinction between negligence and unseaworthiness. The epitome of his efforts is to be found at pages 39-40 of his brief:

"Thus, the jury was entitled to conclude that all of the actions of the defendant were consistent with the standard of reasonable care. And yet, they could also have found that, under the circumstances prevailing on the day of the accident, the stowage of the containers did not result in a properly safe working surface for Anton Picinich.

The point is that reasonable care to produce safety is not synonymous with reasonable safety. The former describes activity and the latter describes the end product. The jury here might well have perceived differences between the two standards, and they were entitled to."

That this is a hollow shell of an argument is attested to by the fact that plaintiff's brief is devoid of any speculation as to what basis the jury might have used to find unseaworthiness—and not negligence. Once more, plaintiff adverts to the impermissible and unavailing—the naked happening of the accident.

The Court, in *Spano*, wryly observed that counsel for plaintiff cannot create a cause of action out of nothing by playing the concepts of unseaworthiness and negligence off against each other.

"Any difficulty on this point and others directed to the charge could have been avoided if counsel had not insisted on alleging both negligence and unseaworthiness. It is hard to imagine, especially on the facts of this case, how an owner could be negligent, if the ship was not unseaworthy, see G. Gilmore & C. Black, *The Law of Admiralty* 364 (1957). . . ." *Spano v. Koninklijke*, 472 F.2d at p. 35, footnote 1. See also, *King v. Deutsche-Dampfs-Ges.*, D.C., S.D.N.Y., 1974, 397 F. Supp. 618, 621, 622.

Plaintiff's assumptions are premised upon a line of cases of which *Van Carpals v. The SS American Harvester*, 2 Cir. 1961, 297 F.2d 9, is representative (cf. Plaintiff's Brief, p. 19). *Van Carpals* and other cases teach that the unexplained failure of gear being used as intended will support a finding of unseaworthiness. We do not quarrel with that proposition. See *Avena v. Clauss & Co.*, 1974 2 Cir., 504 F.2d 469.

However, that is decidedly not the fact pattern involved in the case at bar. The jury was fully entitled to reject the testimony of Messrs. Picinich and Morich as incredible. The jury was fully entitled to accept the expert testimony of Captain Wheeler that the account of the accident given by plaintiff was not physically possible. The jury was fully entitled to accept the testimony of Captain Vangsnes that the undisturbed position of the container on which Picinich had been standing was the same after the accident as before.

The jury obviously did so find. Plaintiff's burden was to make an initial demonstration that:

- (1) the accident described by Picinich was possible;

- (2) the accident as described by Picinich did, in fact, happen the way he asserted;
- (3) the accident did, in fact, involve a failure of a piece of equipment;
- (4) the gear in question was not reasonably fit.

Plaintiff failed on all four grounds.

The Fourth Circuit has taught that the jury determination of an unseaworthiness issue depends on whether "fair minded men, viewing all the facts and the inferences to be drawn from the facts can differ over whether the ship and its gear are reasonably fit for service . . ." *Lundy v. Isthmian Lines, Inc.*, 4 Cir. 1970, 423 F.2d 913, 915.

To the extent that the plaintiff attempts to shirk his obligation to present credible evidence preponderating in his favor on the issues of unseaworthiness and negligence, he finds little solace in the actual state of decisional law. This Court addressed the problem in *Ianuzzi v. South African Marine Corporation v. ITO*, 2 Cir. 1975, 510 F.2d 950, and said, at p. 952:

"In order to fix liability on the shipowner under this factual theory, plaintiff of course had to establish that the car swung because of winch malfunction, rather than solely because of operator error."

A similar observation, i.e., on the unavailability of some species of *res ipsa loquitur*, is equally applicable to the negligence branch of plaintiff's position.

"We do, however, find merit in South African's objection to plaintiff's argument as a proposition of law. Plaintiff is really seeking to turn this into a *res ipsa loquitur* case, where negligence may be found even though the plaintiff is unable to show precisely what went wrong. But here, the winch was being operated by an employee of ITO, not of South African, and

thus the 'control' element of *res ipsa loquitur* is lacking. *Irwin v. United States*, 236 F.2d 774, 776 (2d Cir. 1956). Since *res ipsa loquitur* is not involved, plaintiff's theory would require us to hold South African potentially liable in a situation where, assuming it breached a duty by continuing to operate the winches, the resultant accident was not within the scope of the risk foreseeably incurred by that breach of duty. This we decline to do." (510 F.2d at 955).

POINT II

The shipowner is not liable for either the negligence of the plaintiff himself or the negligence of his coworkers whether the claim is couched in negligence or unseaworthiness.

The trial of the case at bar represented, as we have seen, a steady deterioration of the credibility of plaintiff's claims. The last straw grasped by a maritime plaintiff is a recourse to the "method" theory.

The plaintiff, by his counsel, devoted a substantial part of his opening (several pages in the transcript) to a recitation of the sins of unseaworthiness and negligence laid to the hapless shipowner (A15-A17). Understandably, the "improper method" approach received short shrift.

"We would be entitled to recover if the stevedoring company used any improper method of unloading the containers." (A17).

By the time the moment had come for plaintiff's counsel to sum up, the meagerness of plaintiff's original claim led to a greater weight being placed by plaintiff's counsel* on some mysterious "method" theory (A872-873).

* Whose identity had undergone a comparable sea change (A221).

To arrive at this ingenious conception, plaintiff's counsel could only advert to a *McGrath* accident report (scarcely admissible against the vessel whatever the import of its conclusory language) (Exhibit 8).*

By rhetorical question, plaintiff's counsel outlined his own argument:

"What was the procedure that should not have gone forward? They should not have lifted off number four while he was still on number three." (A872).

Not for the only time, plaintiff himself contradicted the argument of his own counsel. Plaintiff's job function, he testified, necessitated that he attach the ship's cargo hook to a bridle in turn connected to the four corners of the container (A37). No one told the plaintiff what container to step on to after he had finished hooking up the first container (A90)—indeed, in his opinion it made no difference at all (A90). To suggest that each of the longshoremen should have come down from atop the containers would border on the ludicrous and certainly there is no testimony to support such a thought (if that is what plaintiff is now obscurely articulating).

Plaintiff's brief (pages 54, 57 and 58) makes reluctant reference to the decision of the United States Supreme Court in *Usner v. Luckenbach Overseas Corp.*, 1971, 400 U.S. 494, 27 L.Ed.2d 562, 91 S.Ct. 514.

The instant case would seem to constitute the most clear-cut example of the practice on the part of claimants' counsel of deliberately seeking to muddle the distinction between

* Plaintiff's brief adverts to the presence of two lashing wires atop the container (plaintiff's brief pages 52-53). The Court specifically directed the jury to consider whether the presence of those wires rendered the vessel unseaworthy (A918). The result reached by the jury conclusively determined that the presence of the lashing wires at the time and place in question was neither unreasonable nor unseaworthy. In this respect the Court's observation (A938) was amply ratified by the jury finding.

negligence and unseaworthiness. To suggest that the negligent act of a fellow longshoreman *ipso facto* leads to an unseaworthy condition was the very vice condemned by the highest Court.

"What caused the petitioner's injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo, or her crew, but the isolated, personal negligent act of the petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions." *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 500, 27 L.Ed.2d 562, 567, 91 S.Ct. 514.

This Court demonstrated its recognition of the principle that a third party's negligence cannot be visited upon an otherwise innocent shipowner under the guise of "unseaworthiness".

"Liability was premised upon the theory that an act of plaintiff's co-worker caused the accident and that 'a ship is rendered unseaworthy when longshoremen make negligent use of seaworthy equipment'."

* * *

"The majority opinion reviewed the many cases which over the years have created the problem and came to the conclusion that it would be erroneous 'where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence'." *Tarabocchia v. Zim Israel Navigation Co. v. John W. McGrath Corp.*, 2 Cir. 1971, 446 F.2d 1375, 1376.

The English language is sufficiently flexible and rich in nuance to offer full opportunity for logic chopping and semantic distortion. Of course, any claimant's counsel, as witness the instant case, can assert that the negligently

caused accident equates with a "method" which, in turn, equates with "unseaworthiness". But our system of jurisprudence seeks to make the determination of legal issues comport with reality rather than with casuistry.

In scathing language, the Ninth Circuit censured this desperate recourse in *Ryan v. Pacific Coast Shipping Co., Liberia*, 9 Cir. 1975, 509 F.2d 1054:

"To convert this single negligent act into an unseaworthy condition *is to play a game with words*. This we decline to do. Virtually any such act could be described as an adoption by the person committing the act of an unsafe practice. For example, in *Usner* the Supreme Court could well have said that the winch operator adopted the practice of lowering the fall 'too fast'. However, it clearly rejected such an approach. Here the Court's reasoning impels us to conclude that this one-time occurrence—the banging of the steel pipes against a railroad car—did not give rise to any unseaworthy condition." At page 1057 (see also footnote 6). (emphasis supplied)

It must be recalled that the plaintiff reported to the vessel at 8:10 on the morning of the accident (A33-34). The ship, testified Picinich, had just arrived (A33). The container which was lifted inboard from the stack of eight on the after offshore end of the *Concordia Viking* was the very *first* operation undertaken by the longshoremen (A41-44, A124-129). How this suggests a continuing "method" defies imagination.

For a clear headed deflation of another plaintiff's efforts to transmute a simple act of negligence into a grandiose "method", the opinion of the Ninth Circuit in *Adams v. Ugland Management Co.*, 9 Cir. 1975, 515 F.2d 89, 90-91, is instructive. The Court said, in part, on this score:

"From common experience in absence of proof one would assume that each snagged line presents its own

circumstances and that each case is attacked individually rather than by resort to established general practice. It was not method, then, but the course chosen to meet this single, isolated problem, that created the hazard. A single, isolated act of negligence under *Usner* can, in our view, consist of a reckless choice of solution to an isolated problem as well as an isolated act in the performance of ongoing duty."*

The jury in the case at bar carefully considered plaintiff's claims that the containers were improperly stacked and improperly secured—and rejected them. That jury verdict cannot be subverted by a fanciful claim of "method unseaworthiness".**

If, indeed, the accident was caused by a bumping of the container on which Pieinich stood (as suggested by Exhibit 8) instead of in the manner sworn to by Picinich and Morich (and found incredible by the jury), it would still fall squarely within the ambit of the *Usner* rationale.

* See also *Ward v. Union Barge Line Corporation*, 3 Cir. 1971, 443 F.2d 565, 571.

"And while there is authority to indicate that the incompetencies of the captain or the unfitness of the crew renders a vessel unseaworthy, it is now clear that such incompetence or unfitness might rise to the level of a hazard of the vessel and that mere acts of negligence do not constitute unseaworthiness."

** "However difficult it may sometimes be to draw the line between a pre-existing 'condition' and the isolated, personal unforeseeable act of a fellow longshoreman, see *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 500, 91 S.Ct. 514, 27 L.Ed. 2d 562 (1971); cf. *Siderewicz v. Enso-Gutzeit O/Y*, 453 F.2d 1094 (2d Cir. 1972), we have no such problem here. There was simply no evidence that the supporting cartons were less than normally sturdy or that the stowage was unsafe before the very heavy carton was placed on the top. *The accident occurred as part of a continuous, perhaps negligent, operation which never gave rise to an unseaworthy 'condition.'*" *Caparro v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 2 Cir. 1974, 503 F.2d 1053. (emphasis supplied)

Perhaps the original line of testimony proffered on plaintiff's behalf is the best telltale demonstrating that the "bumping" version (Exhibit 8) or the loss of balance version (the ship's log) was, in the judgment of his own counsel, legally insufficient to support a claim. The surprise witness, Langan, as we have seen, only appeared on the scene after it became very obvious that plaintiff's account was physically unbelievable. Whatever the legal sufficiency of plaintiff's original account (if it had been believed) to sustain a claim for "unseaworthiness", the alternate account to which belated recourse was had does not suffice to impose liability upon the part of shipowner.

Put baldly, "operational negligence has not been subsumed under the doctrine of unseaworthiness" (*Earles v. Union Barge Line Corporation*, 3 Cir. 1973, 486 F.2d 1097, 1107. Where an industrial accident "could have been caused only by the negligence of the plaintiff or the momentary negligence of a co-worker and not by any condition on the ship" (*Robinson v. The M/V Merc Trader*, 5 Cir. 1973, 477 F.2d 1331, 1333), a claim of unseaworthiness is simply not sustainable.

For the trial court to have acceded to the desperate blandishments of plaintiff's counsel and to have charged some theory of "method" unseaworthiness would have received a complete rejection by the trial court of the actual testimony in the case. In attempting to transmute a (slightly compensable) industrial accident into a tort windfall, plaintiff neglected the small requirement that a tort claim must be predicated upon some judicially recognizable and creditable set of facts. This was simply not the case—a situation recognized fully by Judge and jury alike.

CONCLUSION

The verdict of the jury and the judgment of the court should be sustained in all respects.

Respectfully submitted,

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